STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court Case No._____
Court of Appeals Case No. 323387
Court of Appeals Case No. 329264
Saginaw County Probate
Case No. 13-130558 DE

In Re:

James Erwin, Senior, Deceased
_____/

APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO MICHIGAN SUPREME COURT

L. FALLASHA ERWIN (27018)
Commercial Law Corporation, P.C.
Attorney for Appellant
220 Bagley, Suite 1010
Detroit, MI 48226 (313)
964-2502 (phone) (313)
964-2929 (fax)
Email: ferwin@sbcglobal.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

OPINION AND ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant Beatrice King ("King") seeks leave to appeal from the Michigan Court of Appeals' May 10, 2016 Unpublished Opinion and Order (the "Opinion") (Ex A) which affirmed the Tuscola County Probate Court's, sitting for the Saginaw County Probate Court ("Saginaw"), Orders finding that Appellee Maggie Erwin ("Maggie") is the surviving spouse of the decedent, James Erwin, Senior, who died intestate even they had not cohabitated as husband and wife for approximately 35 years. King also seeks leave to appeal of the opinion that denies contribution for marital property Maggie was absence from for 35 years, a finding that Maggie is an interested person who has standing to remove King as the Estate's personal representative, the removal of King as the personal representative, the denials for the requests for a change of venue and disqualification of the Tuscola County Probate Court judge.

This application of leave to appeal is a consolidation of Docket # 323387 and 329264[1]. Without the admission of evidence, either authenticated documents or sworn testimony, the Tuscola County Probate Court neglected to follow well-established statutes and court rules. After reviewing the record, the Court of Appeals affirmed Tuscola without addressing the key issues of no sworn testimony or authenticated documents.

King asks this Honorable Court to grant leave to appeal because the Court of Appeals' Opinion: (1) circumvents the legislative intent of MCL 700.2801which excludes certain spouses from the definition of surviving spouse by affirming a probate court order not based on sworn testimony or documentary evidence but attorney argument; (2) misapplies the Michigan Supreme Court decision in *Tkachik v. Mandeville*, 487 Mich 38, 790 NW2d 260 (2010) on when

[1] Because of the consolidation of two dockets in the Court of Appeals, there were a number of probate court's orders that will be referenced. Each order and relevant transcripts will be attached as an exhibit.

contribution from an absent spouse should be given on entireties property passing by operation of law; (3) interpretation of statutes that would ignore the enactment of the Estates and Protected Individuals Code (EPIC) effective April 1, 2000 but relied on a case decided under the repealed Revised Probate Code (RPC); (4) involves legal principles of major significance to Michigan jurisprudence: (a) whether the Court of Appeals can effectively overturn a decision of the Michigan Supreme Court by implying factors different than the Legislators intent and finding of the Court (b) whether a probate court can render a decision without evidence but merely on the argument of counsel; (5) was a clearly erroneous decision because it condones materially prejudicial rulings that was inconsistent with proofs provided the probate court. After granting leave to appeal, King further asks this Court to reverse the Court of Appeals and Tuscola sitting for Saginaw. Alternatively, King requests the reversal of the Court of Appeal and Tuscola sitting for Saginaw and order an evidentiary hearing be held on the orders entered by Tuscola.

STATEMENT OF QUESTIONS PRESENTED

I.. Whether the Tuscola County Probate Court improperly removed King as the personal representative of the Estate of James Erwin, Senior, Deceased?

Appellant answers “Yes.”

Appellees answer “No.”

Probate Court answered “No.”

Court of Appeals answered "No"

II.. Whether Maggie would be unjustly enriched if she does not contribute to the estate of JES by receiving entirety property?

Appellant answers “Yes.”

Appellees answer “No.”

Probate Court answered “No.”

Court of Appeals answered "No"

III Whether Beatrice King (King) was subject removal as the personal representative of the estate pursuant to MCL 700.3611(2)?

Appellant answers “Yes.”

Appellees answer “No.”

Probate Court answered “No.”

Court of Appeals answered "No"

IV Whether the probate court erred in denying King and other interested persons' petition for change of venue for the convenience of the majority of interested persons under MCR 5.128?

Appellant answers “Yes.”

Appellees answer “No.”

Probate Court answered “No.”

Court of Appeals answered "No"

V. Whether the Tuscola County Probate Court Judge should be disqualified from hearing the instant action?

Appellant answers “Yes.”

Appellees answer “No.”

Probate Court answered “No.”

Court of Appeals answered "No"

I. INTRODUCTION

This case is a consolidation of two dockets from the Court of Appeals and involves several questions. The first case is Docket # 323387 and the first question in the case is the exclusion from the statutory definition of a surviving spouse of a decedent who dies without a will. The decedent, James Erwin, Senior, ("JES") married Maggie Grays a/k/a Maggie Erwin ("Maggie") in 1968. He died on October 17, 2012 without a will. At the time of his death, he still was married to Maggie. However, Maggie voluntarily moved out of the martial home with JES in 1976 and remained separate household until his death.

JES was married twice and had ten heirs, all adults. Maggie was mother of the four youngest heirs and at the time of his death, JES was still living separately from Maggie and did not support her. Maggie's children claimed she was JES' surviving spouses and have collected and refused to disclose what assets have been collected and the status of those assets. Beatrice King ("King") was appointed personal representative in June of 2013 and was stonewalled in her efforts to marshal assets of the Estate requiring her to file multiple motions to compel disclosure. Because Maggie has been absentee spouse for over thirty years, the probate court had to determine whether she was excluded as a surviving spouse under MCL 700.2801(2)(e).

In addition, the probate court had to decide whether Maggie should contribute to the Estate for the entirety property acquired by JES during the marriage. The Supreme Court in *Tkachik* v. *Mandeville*, 487 Mich. 38 (2010), found it would be unjust enrichment for a separated spouse to receive entirety properties without contributing to the deceased spouse's estate. The probate court without sworn testimony and credible evidence found that Maggie was the surviving spouse of JES and she did not have to contribute to the Estate for not assisting in the maintenance of the entirety property during her absence of over thirty years.

The probate court failed to follow the clear definition of an excludible surviving spouse as stated in MCL 700.2801(2)(e). Moreover, the probate court's failure to order contribution to the JES Estate was contrary to the holding of *Tkachik, supra.* Accordingly, King requested the Court of Appeals to correct the probate court and find Maggie is an excluded spouse under MCL 700.2801(2)(e) and that she should make the appropriate contribution to the JES Estate as an absentee spouse who is acquiring entirety property. The Court of Appeals affirmed the probate court.

The second case of the consolidation is Docket # 329264. This case involves several issues and King requested the Court of Appeals to correct errors of the probate court.

First, King was removed as the personal representative from the Estate by Maggie not for mismanagement or fraud but for failure to provide an accounting to the minority group of interested persons who had access and control over the decedent' assets prior to his death. King has sought to recover the concerned assets from these same individuals and has been stonewalled in her attempts. King had the support of the majority of interested persons who wanted all assets disclosed.

King had challenged Maggie's standing as an interested person to file a petition for removal since her status as an interested person was as the surviving spouse of JES. Since the appeal was pending before the Court of Appeals, King asserted MCL 600.867(1) prevented Maggie from pursing a petition to remove the personal representative because of the statutory stay of a final order. The probate court would not issue a stay and the Court of Appeals separately refused to enforce a stay.

The second and third issues involved the change of venue and disqualification of the probate judge sitting in Tuscola County. The issues are related since the majority of heirs wanted

a change of venue because the Tuscola County Probate Court exhibited through the proceedings bias in favor of the children of Maggie. Moreover, the regular communication between the Saginaw County and Tuscola County raises suspicion that Saginaw County, whose probate judges were supposed to be disqualified, were directing the proceedings held in Tuscola County.

The Supreme Court in *Terrien* v *Zwit*, 467 Mich 56; 648 NW2d 602 (2002) restricted lower courts from creating and identifying public policies that individual judges thought were worthy of furtherance, or from general considerations of supposed public interest. The Supreme Court ruled that only the Legislature may create public policy. Moreover, the Supreme Court emphasized that Michigan public policy is not merely the equivalent of the personal preferences of one particular judge or a majority of an appellate court unless a policy is clearly rooted in the law and there is no other proper means of ascertaining Michigan public policy.

The probate court and the Court of Appeals with the decision in the instant matter, is establishing a new public policy on the definition of a surviving spouse and when an absent spouse must contribute to an estate when receiving entirety property. By adopting standards not provided in the statute and arbitrarily selecting argument as substantive proof, the lower courts have established public policy forbidden by *Terrien.*

By granting King's application, the Court can correct the lower courts and remind the lower courts that setting public policy is still in the hands of the Legislature.

II. GROUNDS FOR REVIEW BY THIS COURT

This Application meets the criteria for appeal under MCR 7.305(B)(3), and (5).

A. The issue involves Legal Principles of Major Significance to the State's Jurisprudence, MCR 7.305(B)(3)

This case involves the interpretation of a provision of the Estates and Protected Individuals Code (EPIC) which became effective on April 1, 2000 and replaced the Revised Probate Code (RPC). Specifically, MCL 700.2801(2)(e) defines spouses that are excluded from the definition of surviving spouses for decedents who die without a will. Instead of the Court of Appeals following the plain language it relied on statute that was replaced by the EPIC. The Court of Appeals' ruling is a setback to the jurisprudence of the State since it reverts back to a law that was repealed. This ruling is evidence of the Court of Appeals setting new public policy

Moreover, the Supreme Court established the standard on a separated spouse when entireties property passes by operation of law in *Tkachik, supra.* The Court of Appeals ruling in this matter effectively reverses the Supreme Court decision affecting the State's jurisprudence on when contribution should be made on martial property when one spouse has been absent from the deceased spouse for over a year.

As part of a consolidated docket, the Court of Appeals affirmed the probate court's order that allowed the removal of King as personal representative without an evidentiary hearing to obtain the evidence that would support the removal. The Court of Appeals is allowing a dangerous precedent to be established. The jurisprudence of the State requires that a court ruling be based on evidence presented. If the Court of Appeals' decision is allowed to stand, it will represent a significant change in the jurisprudence of the State.

B. The Court of Appeals' Decision is Clearly Erroneous and Will Cause Material Injustice MCR 7.305(B)(5)

As discussed below, the Court of Appeal's decision on the issues presented herein are clearly erroneous. The Court of Appeals decision in determining whether a spouse is a surviving spouse under the Michigan intestacy law by reverting back to the Revised Probate Code instead of

the utilizing the statute as passed under the EPIC is clearly erroneous. The probate court failed to hold any hearing where evidence was submitted but relied on the Appellee's counsel argument. The Court of Appeals supposed the probate court's action in finding that Maggie was the surviving spouse of JES even though the couple had not lived together for over thirty years.

The above holding was a companion to the ruling that the Appellee did not have to contribute to property she obtained through operation of law even though she did not live with the decedent, did not pay for the maintenance of the property for thirty years. The Court of Appeals affirmed the actions of the probate court even though King had submitted affidavits from third party and the Appellee failed to submit admissible evidence. The ruling supporting the probate court is clearly erroneous and threatens to take the State down the road where admissible evidence is not controlling but the whim and individual preference of a local judge is controlling. No judge should have the authority to set public policy with unfettered authority. If the ruling of the Court of Appeals is not reversed, the Supreme Court will be bombarded with lower court judges exercising authority that exceeds the office held.

The rulings of the probate court removing King as personal representative, rejecting a change of venue and disqualification of the judge were all affirmed by the Court of Appeal. The discussion below will demonstrate that the ruling of the Court of Appeals is clearly erroneous.

III. STATEMENT OF MATERIAL PROCEEDING AND FACTS

A. UNDERLYING FACTS DOCKET # 323387

1. Family Background

James Erwin, Senior, the decedent, (JES) passed on October 17, 2012 without leaving a will. The decedent migrated from Texas to Saginaw Michigan in 1944. The remainder of his life

he lived in Saginaw until his death in Kansas. JES was married twice. His first marriage was to Mattie Atwater a/k/a Mattie Erwin, produced had six children: L. Fallasha Erwin (LFE)[2], Holly, MI; Beatrice King (King)[3] , Clarkston, MI; Yvonne Flowers, Bridgeport, MI; James Erwin, Jr., Saginaw, MI; Brenda Erwin, Saginaw, MI; and Belinda Erwin, Saginaw, MI.

JES' second marriage was to Maggie Grays a/k/a Maggie Erwin (Maggie) in 1968 and this union produced four children: Sherry Erwin; Jacqueline Nash (Nash), Olathe, KS; Billy James Erwin, Saginaw; MI and Stacy Erwin Oakes (Oakes), Saginaw, MI. Sherry passed away in1991 leaving one son, Demarkius Erwin.

JES was an independent individual and lived alone until health issues caused him to require assistance with his day-to-day affairs. During his life, Willie C. Erwin, Victoria Harris, and Hattie Price all assisted him in his personal and business affairs. (*E*x B) Roughly the last two years of his life, JES suffered from dementia causing him to require around the clock observation. Maggie never assisted or maintained a relationship with JES in any fashion after her departure in 1976.

LFE is the oldest child from JES' first marriage and Nash is the oldest child from his second marriage. They had several telephone conferences regarding JES' health. In the early part of April 2012, they made the decision that JES would move in with Nash in Kansas. LFE and Nash communicated regularly while JES was in Kansas until he passed away 6 months later.

2. <u>Initiation of Probate Processing</u>

The cooperation between the two sets of JES' children ceased after JES' death. Maggie's children chose to make decisions regarding the Estate of JES without the input of the children

[2] Attorney for the personal representative, Beatrice King.

3 Appointed the first personal representative

from JES' first marriage. Because of the lack of communication and lack of cooperation from Maggie's children, LFE and King, JES' oldest children, petitioned the Saginaw County Probate Court to open a probate estate for JES.

On May 6, 2013, King served all potential heirs of her intent to open an informal probate estate for JES and anyone who wanted to object had 14 days to do so. None of the potential heirs filed objections and King filed for appointment and was appointed the personal representative of JES' estate on June 12, 2013. Again, no heirs filed objections to the appointment of King.

On June 23, 2013, King informed all potential heirs of her appointment as personal representative and requested certain material and information to administer the Estate. No heirs served responded to the request.

3. Probate Court Processing

When Maggie's children failed to respond, King filed a motion to compel production and a hearing date was set for October 2, 2013. Nash's response was to file a petition to remove King as personal representative.

Because of the relationship that Oakes had with the probate court judges in Saginaw County, they disqualified themselves. The Saginaw County Probate Court initiated the process that had the matter assigned to Judge Nancy L. Thane, Family Court Judge of Tuscola County.

The assigned probate court judge scheduled a hearing for January 22, 2014 on King's motion to compel, inspection and Nash's petition for removal of King as personal representative of the JES estate. The scheduled hearing date, however, was based upon the forged signature of King's counsel (LFE)[4] who only learned of the hearing approximately one week before the hearing date. The assigned probate court judge issued orders dated January 24, 2014 granting

King's motion to compel and for inspection and dismissing the petition for removal of King as personal representative.

LFE served all the interested parties with the order to compel and for inspection. All interested parties delayed King in her inspection of the Douglass property preventing an inventory of the contents of the property. This inventory has been ongoing since disclosures that were made were either evasion or inconclusive. Moreover, the probate court order to compel was either completely ignored or respondents gave incomplete and/or deceptive answers.

Because of the lack of response from the interested parties served, King filed a Motion for Sanctions. In the motion, King argued that the respondents had not complied with the earlier probate court order to compel discovery requests and described the deficiencies. In addition, King argued the probate court should have awarded sanctions pursuant to the court rules because the issuance of the order to compel required the probate court to issue sanctions since the conditions for issuance were satisfied.

Because of issues that arose regarding access to the Douglass property and the claim of Maggie that she was the surviving spouse of JES, King filed a Motion for Determination that Maggie is not the surviving spouse of JES and that she should contribute to the Estate of JES for the Douglass property. The probate court set a hearing date of July 9, 2014. Prior to the hearing date, King only received responds from Oakes and Maggie. In addition, Maggie had filed a late claim for funeral expenses. King issued a subpoena to Maggie to testify at the hearing.

4. Motion Hearing

At hearing, for the first time Maggie's counsel disclosed that Maggie would not be attending the hearing. (07/09/14 Tr. 4 L 5-11) King filed three affidavits of Willie C. Erwin,

[4] LFE filed an affidavit with the probate court stating his signature on a stipulation for the hearing

Victoria Harris, and Hattie Price who knew JES and who could testify about his personal and business affairs. (07/09/14 Tr. 4 L 13-23), (Ex B) Oakes and Maggie offered no sworn testimony or substantiated evidence.

However, the probate court allowed Nash to make a statement to the court but not under oath. (07/09/14 Tr. 24-29). The probate court did not allow any sworn testimony or allow any other interested parties to make statements. (07/09/14 Tr.29 L 17-22) King's counsel had requested the probate court to allow others to testify (07/09/14 Tr. 29 L 16-22) because of the statements made by Nash were not under oath, were not true and an evidentiary hearing would allow credible evidence to be collected. (07/09/14 Tr. 35 L 1-3). The probate court judge decided that she would take the matter under advisement and decide whether the motions warranted an evidentiary hearing. (07/09/14 Tr. 35 L17-23).

The probate court judge then made an unusual statement, "I'll probably be putting myself right out there on the fence for this" and went on to imply the JES heirs who started the probate estate may have done so just for money. (07/09/14 Tr.36).

The probate court issued an opinion on July 17, 2014 based only on Maggie attorney's arguments, and Nash's statements not made under oath to determine that Maggie was JES' surviving spouse and Maggie would not have to contribute to JES' estate for the entirety property. (Ex C)

The probate court opinion required King to submit an order for execution by the court. The submitted order was signed order on August 7, 2014. The probate court issued a corrected order on September 2, 2014 to reflect properly that the hearing was held on July 9, 2014 and not on January 9, 2014.

---

date was falsified. Appellant Brief Docket # 323387 Ex D.

King timely filed a Claim of Appeal on August 27, 2014.

B. UNDERLYING FACTS DOCKET # 329264

1. Civil Action

Shortly after King filed the Claim of Appeal on August 27, 2014, Maggie filed a civil action on a claim for the funeral expense for JES on November 17, 2014. King disallowed the claim because Maggie submitted the claim on March 18, 2014, several months after the period had expired on October 21, 2014 for submitting estate claims. The claim only arose after King had made several discovery requests on interested persons that went unanswered. Those interested persons were primarily Maggie's three children, who were the last individuals in control of JES' assets. King was compelled to file two motions to compel discovery requests. To date, the probate court has neglected to order compliance but instructed King to submit more interrogatories to the unresponsive individuals. (Ex C)

After Maggie filed the civil action, King filed a motion to stay the civil action on December 12, 2014. At a hearing held on January 16, 2015, the probate court denied the request for a stay. King sought a stay because the paramount issue of the administration of the Estate is whether Maggie is the surviving spouse of JES since a surviving spouse has superior priority in the administration of an estate.

Maggie instituted the civil action as the real party in interest based upon a sworn claim made under penalty of perjury that she had paid cash for the funeral of JES. During the discovery period, King made several discovery requests of Maggie. Instead of filing a response, on March 25, 2015, Maggie filed a Motion for a Protective Order and Sanctions. King responded arguing Maggie has not established the grounds for that a protective order. The probate court did not conduct an evidentiary hearing on the request for a protective order; King raised several

objections, which the probate court rejected. The probate court ruled in favor of Maggie and instructed Maggie's counsel, Carolyn Bernstein ('Bernstein"), to submit the order under the seven-day rule under MCR 2.602(B)(3). King objected to the accuracy of the Maggie's proposed order and the probate court set a hearing date of May 27, 2015.

In the process of obtaining the protective order, Bernstein, revealed for the first time that Oakes held a Power of Attorney for Maggie at the time King was appointed personal representative. The Power was not executed until May 24, 2013. However, Maggie's counsel had argued before the probate court that Maggie suffers from Dementia specifically Alzheimer disease. This medical condition existed beginning in or prior to 2010 and raised the issue of whether Maggie had the mental capacity to execute a Power of Attorney. Moreover, law office representing Maggie drafted the Power and neither Bernstein nor her predecessor ever disclosed to the probate court or King's counsel that Maggie had executed a Power of Attorney appointing Oakes as her representative.

2. <u>Removal of King as Personal Representative and Request for Stays</u>

On March 25, 2015, Maggie as surviving spouse also filed a petition to remove King as personal representative and for sanctions. On April 8, 2015, King filed a Response and Brief to Maggie's petition for removal and sanctions, which addressed the allegations for removal. (Ex D) The probate court scheduled the hearing on the petition for removal for April 15, 2015. One day prior to the hearing, April 14, 2015, Maggie filed a First Supplement to the Petition to Remove Personal Representative.

At the April 15, 2015 hearing, King objected to the Petition to Remove Personal Representative because it failed to comply with the Michigan Court Rules, specifically MCR 2.114(B)(2). Since neither Maggie nor her counsel, Bernstein signed the petition under penalty of

prejudice; the probate court instructed Maggie to correct the petition, re-file it, and schedule a new hearing.

Prior to the May 27, 2015 hearing date on King's objection to the order granting a protective order to Maggie, King filed a motion in the Court of Appeals on April 20, 2015, to stay Maggie from acting as JES' surviving spouse since the Court had not decided the issue. King argued the Court should prevent Maggie pursuant to MCL 600.867(1) from filing a petition to remove King as a surviving spouse when the Court had not decided that issue of whether she is JES' surviving spouse. King also filed in probate court on April 20, 2015, a Petition and Order to Change Venue for the convenience of the witnesses and parties.

By a vote of 2 to 1, the Court of Appeals denied King's Motion for a Stay without explanation from the majority on May 14, 2015. This ruling allowed Maggie to purse her petition to remove King as personal representative.

One day after King filed her Motion for a Stay in the Court of Appeals and Petition and Order to Change Venue in probate court on April 21, 2015, Maggie filed an Amended Petition to Remove the Personal Representative and sought sanctions in probate court and set a hearing date of May 18, 2015. This amended petition was the same as the original petition except the petition complied with MCR 2.114(B)(2) and sought sanctions. Oakes' counsel, Robert Miller ("Miller"), filed a Response supporting the petition filed by Maggie. The Response supporting the amended petition was basically identical to the Response filed on the original petition on April 7, 2015

3. <u>Restraining Order</u>.

On May 1, 2015, without notice to King, Maggie filed an ex-parte Petition for a Restraining Order and Consolidate Hearings. The rationale Maggie gave for the requesting the restraining order and to consolidate hearings was that King had filed a motion for a stay in the

Court of Appeals and had filed a petition to change venue, which Maggie considered frivolous actions.

In requesting the probate court to consider her unilateral request, Bernstein without consent or notice sought to move hearing dates established by King, May 6, 2015, and May 27, 2015, to a date solely selected by her, May 18, 2015.

Although Bernstein did not give King advance notice of her filing of the ex-parte Petition for a Restraining Order and Consolidate Hearings, she apparently had communication with Miller who had an ex-parte communication with the presiding judge in Tuscola County and also sent the ex-parte communication to the chief judge of Saginaw County who because of prior dealings with Oakes had disqualified himself.

The probate court granted Maggie's request and issued a restraining order and an order to consolidate hearings on May 5, 2015[5]. The probate court without notice to King and her counsel issued the restraining order one day prior to the scheduled hearing date of May 6, 2015 on King's Petition and Order to Change Venue. The probate court allowed Maggie unilaterally to change a hearing set by King for May 27, 2015 but allowed the May 6, 2015 hearing to go forth for unknown reasons.

4. <u>May 6, 2015 hearing on Change of Venue</u>

On May 6, 2015, the probate court held a hearing on King's Petition and Order to Change Venue. During the hearing, neither the probate court nor Bernstein informed King and her counsel that the probate court had issued a restraining order the day before restricting their activities in behalf of the Estate. Miller did not attend the hearing on May 6, 2015. In addition, neither the probate court nor Bernstein disclosed they had changed the May 27, 2015 hearing

[5] Appellant Brief Docket # 329264 Ex Y.

scheduled by King without concurrence from King and/or her attorney. Bernstein, however, did disclose during the hearing that she had scheduled the hearing for removal of King as personal representative for May 18, 2015.

5. <u>May 18, Hearing to Remove King as Personal Representative</u>

The probate court denied King's Petition and Order for Change of Venue at the May 6, 2015 hearing[6]. After the probate court's ruling, King's counsel disclosed to the probate court that he had a conflict with the hearing date of May 18, 2015 because he had a status conference scheduled in United States District Court before Judge Sean Cox.

King's counsel mistakenly understood the probate court's request that he should provide proof of the conflict to opposing counsel only. King's counsel missed the probate court's request that King's counsel also provide proof of the conflict to the probate court. King's counsel provided proof to opposing counsel but failed to provide the same proof to the probate court.

On May 15, 2015, Friday, Judge Cox Judge Cox rescheduled the status conference that he was to hold on May 18, 2015. As a professional courtesy, King's counsel informed opposing counsel of the adjournment with the expectation that Bernstein was scheduling an alternative hearing since King was not available on May 18, 2015.

While King and her counsel were restricted by the probate court's restraining order of May 5, 2015 from taking any action in behalf of the Estate including filing or responding to matters of the Estate, Bernstein on May 11, 2015, seven days before the proposed May 18, 2015 hearing, filed a Supplemental Brief in Support of Petition to Remove Personal Representative.

With King not available for a May 18, 2015 hearing and King's counsel expectation that an alternative hearing date would be set, Neither King nor her counsel appeared in Tuscola

[6] The denial was actually decided on May 5, 2015 in the restraining order. Appellant Brief Docket # 329264 Ex Y

County Probate Court on May 18, 2015. However, Bernstein and Miller both appeared for the May 18, 2015 hearing although Miller did not appear for the May 6, 2015 hearing. Neither Bernstein, nor Miller nor the probate court attempted to contact King or her counsel to inform them that the hearing of May 18, 2015 was taking place.

The probate court granted Maggie's petition to remove King as personal representative, award sanctions and allowed Maggie to appoint a successor personal representative without notice to any of the interested persons. Apparently, the Tuscola County Probate Court did not consider the written Response filed by King (Ex D) that addresses allegations made by Maggie

Bernstein allegedly mailed the proposed probate court's order under the seven-day rule, MCR 2.602(B)(3), on May 20, 2015. Because May 25, 2015 was the designated national holiday, Memorial Day, King's counsel did not receive the proposed order in his office until May 26, 2015. This receipt date was the last date that that King could file objections to the proposed order.

King prepared and faxed objections to the proposed order on May 26, 2015. King's counsel then telephoned the Saginaw County Probate Court to advise the staff that objections to the proposed order had been faxed and he was placing the filing fee for the objections in the mail that day.

The Saginaw County Probate Court rejected the filing of the objections because the filing fee did not accompany the objections. With King's counsel located in Detroit and the time constraints he had to prepare objections, he could not get the $20 filing fee to Saginaw before the.Register's Office closed. The probate court subsequently signed the proposed order over King's rejected objections.

6. Rehearing

On June 18, 2015, King filed a Motion for Rehearing of Order Removing the Personal Representative, Rehearing on Motion for Change of Venue for the Convenience, Motion

for Stay Pending Appeal, and Motion for Disqualification of Judge. The probate court set a hearing date of July 6, 2015.

On July 6, 2015, King orally argued on the Motion for Stay Pending Appeal and Motion for Disqualification of Judge. The probate court denied all King's motions except for a partial stay. Specifically, King had asked the probate court to stay any further proceeding with the removal of King as personal representative until the Court of Appeals could decide the key issue of the Estate, Maggie's status as a surviving spouse. The probate court decided not to stay the entire proceeding but stayed Maggie from holding herself out as the surviving spouse of JES until the Court of Appeals determined her status.

Maggie presented a proposed order under the seven-day rule and King filed objections that the proposed order did not accurately reflect the probate court's ruling. The probate court held a hearing on the objections on August 13, 2015. The probate court issued the final order on August 26, 2015 that included language of a limited stay of Maggie acting as a surviving spouse.

King filed a Claim of Appeal on September 15, 2015.

C. ERRONEOUS FACTS RELIANCE BY COURT OF APPEALS CONSOLIDATED DOCKET # 323387 AND DOCKET # 329264.

The Court of Appeals in its opinion made would certain erroneous factual conclusions that were not supported by credible evidence on the record. Those errors will be addressed in the argument portion of this application.

IV ARGUMENT

A. STANDARD OF REVIEW

King has presented two questions for review to the Court of Appeals under Docket # 323387. Specifically, whether Maggie is not a surviving spouse because of the exclusion under

MCL 700.2801(2)(e) and whether Maggie would be unjustly enriched if she does not make a contribution to the estate of JES following the ruling of *Tkachik v Mandeville,* 487 Mich 38 (2010).

Generally, MCL 600.866(1) provides that an appeal from probate courts is not heard de novo but on the record. *In re Lundy Estate,* 291 Mich App 347 (2011).

However, a de novo review may be appropriate for issues presented by reasons assigned for appeal. *Meszaros v. Astolas's Estate,* 282 Mich 675 (1937). A review of whether Maggie is excluded from the definition of a surviving spouse under MCL 700.2801(2)(e) involves statutory construction. Appellate reviews of questions of law such as statutory construction are de novo reviews. *In re Nale Estate,* 233 Mich App 525 (2010); *People v Babcock,* 469 Mich 247, 253 (2003); *Veenstra v Washtenaw Country Club,* 466 Mich 155, 159 (2002).

Although the review of the interpretation of statutes is de novo, the standard of review for factual findings in probate court is "clearly erroneous." *In re Webb H. Coe Martial and Residuary Trusts,* 233 Mich App 525 (1999); *Matter of Dupras,* 140 Mich App 171, (1984).

The probate court in determining Maggie did not have to contribute to JES' estate did not do so as a finding of fact but as stated in her opinion, based on argument. King argued before the Court of Appeals if there was no finding of fact then the standard of review will default to a de novo review.

In the Opinion, the Court of Appeals acknowledges that statutory interpretation is a de novo review but implies that the proper standard is clearly erroneous since there was a finding of fact. (Ex A p2) King submits there was never creditable evidence submitted under Docket # 323387 even though the Court of Appeals rules the probate court relied on affidavits presented but

the probate court's opinion clearly neglects to mention the only properly executed affidavits submitted King.

Under Docket # 329264, King argued there was no evidence submitted of any type either sworn testimony or affidavits. If there is no finding of fact, the standard of review cannot be "clearly erroneous." By failing to use the de novo, the Court of Appeals used the wrong standard.

B. EXCLUSION AS SURVIVING SPOUSE.

During the hearing held July 9, 2014, King filed with the probate court three affidavits of Willie C. Ervin, Victoria Harris, and Hattie Price. (07/09/14 Tr. 4 L13-18 Ex B) All three individual had a personal relationship with JES, knew, or was involved in his personal affairs, and all three knew Maggie had not been visible as JES' wife for a minimum of twenty years.

The probate did not consider these affidavits but Court of Appeals ruled that the physical separation "did not operate to foreclose a continued emotional intimacy" and the affidavits only confirmed the separation. (Ex A p5)

At the probate hearing, Maggie's counsel evidence to support Maggie's claim that she is the surviving spouse was purportedly an affidavit of JES. (07/09/14 Tr. 17 L 15-25 Ex E) The document was unsigned and not authenticated. Moreover, Maggie counsel argued that separation was not relevant for MCL 700.2801(2)(e) and that the statute requires a divorce, an annulment, or a filed legal separation. (07/09/14 Tr.18 L 8-10) Maggie's counsel argument was the controlling factor under MCL 700.2801(2)(e) is whether the individuals are married at the time of death if so, the absent spouse shall not be excluded as a surviving spouse. The spouses living together is not an important factor (07/09/14 Tr. 18 L 11-20)

The intestacy laws of the state of Michigan are under Article II, Part 1 of the EPIC, specifically MCL700.2101 through MCL 700.2114. MCL 700.2801(2) provides,

"[f]or purposes of part 1 to 4 of this article[7] and of section 3203, a surviving spouse does not include any of the following;

****

(e) An individual who did any of the following for 1 year or more before the death of the deceased spouse:

(i) Was willfully absent from the decedent spouse.

(ii) Deserted the decedent spouse…."

To determine the definition of "willful absence," the Opinion states "the willful absence provision in context with the desertion and willful neglect provisions, it is clear that the provisions include some level of intent as well as physical distance." (Ex A p2) The Court of Appeals then look for a definition in *Merriam-Webster's Collegiate Dictionary* (11th ed) before adopting now-repealed MCL 700.290, and the case of *In re Estate of Harris* 151 Mich App 780 (1986) decided thereunder. (Ex A p2)

The Court of Appeals decided to ignore current law and relied on a case decided under the Revised Probate Code (RPC) that was effective July 1, 1979 and replaced by EPIC on April 1, 2000. In the *Harris* case, Novel Harris was the surviving husband of his deceased wife, Wilhelmena Harris. Wilhelmena died after 13 years of marriage and 10 days before her death, she executed a will leaving her entire estate to the couple's four children. Novel elected to take against the will and petitioned for a homestead allowance and exempt property, which was all the personal property of the estate. The personal representative denied Novel's petition based on MCL 700.290. At the hearing before the probate court on Novel's claims, the probate court would not allow evidence on the relationship between Novel and Wilhelmena. The probate court

[7] MCL 700.2101 et seq to MCL 700.2401 et seq.

determined the only issue was whether Novel was absent for continuous year or more prior to Wilhelmena's death. The probate court found that MCL 700.290 was not applicable because Novel was **not** absent from the martial home for one year or more continuously.

The personal representative appealed the probate court decision and the Court of Appeals affirmed the decision. The *Harris* Court analyzed the meaning "absent" and "desert." The Court then determined "**[p]hysical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree and has not intentionally given up any rights thereof** (emphasis added)." *Id* at 787. The Court interpreted MCL 700.290 to give a husband and wife at least one year to reconcile.

The Court of Appeals in reaching its decision stated MCL 700.2801(2)(e) and MCL 700.290 are similar provisions but they are not. A careful reading of the *Harris* case actually supported King's appeal. First, under the RPC, MCL 700.141 defines a surviving spouse. (Ex F) A surviving spouse under the RPC generally did not include parities that were divorced or legally separated. However, the Legislature expanded the exclusions of spouses from the definition of surviving spouse for intestacy purposes under the EPIC.

The Court of Appeals decided to apply the reasoning behind the old MCL 700.290 to the instant matter. MCL 700.290, however, was a forfeiture provision while MCL 700.2801(2) (e) is not a forfeiture provision but a definitional provision. Moreover, MCL 700.290 was narrow in its application because it only applied to a party's right to elect against a will. (Ex G)

The drafters of the EPIC decided to use the test of the old MCL 700.290 to exclude from the definition of surviving spouses, spouses who are continuously absence from the deceased spouse at time of death for one year.

The *Harris* Court determined that MCL 700.290. must be read as "showing an intent by the Legislature that a spouse must intend to give up their rights in a marriage before the rights can be lost." *Id* at 786. The Court found the Legislative intent that a spouse chose to give up rights under a marriage if they are intentional absent from the martial home for over one year continuously as stated in the statute. *Id* at 787

If the reasoning of *Harris* was properly applied even under the EPIC, spouses who are absence from the martial home for over one year continuously intents to give up their marital rights. The probate court and the Court of Appeals found that Maggie had been separated from JES for over thirty years. The undisputed fact that Maggie maintained a separate domicile for over thirty years is clear evidence that Maggie was not interested in restoring the marriage with JES and willfully separated herself.

The Court of Appeals has effectively eliminated separation as a principle behind MCL 700.2801(2)(e). The statute calls for "willfully absent" or desertion. The Court of Appeals has promulgated a new public policy by finding that if there is a marriage, the spouse will always be a surviving spouse regardless if the spouse is absent for over one year. MCL 700.2801(2)(e) assumes there is a marriage with the absence of a spouse the critical factor The Court of Appeals interpretation of the statute eliminates the statute as intended by the Legislature and substitutes its ideology for the State's jurisprudence.

To support the Opinion, the Court of Appeals created the term "emotional intimacy" without any reference to the record. The Court of Appeals did not conduct a de novo review and implies that the probate court did not abuse its discretion by relying on a lawsuit filed in 2010[8].

[8] The probate court only had before it unsigned pleading and an unsigned affidavit. If the probate court relied on these documents, they were not in compliance with MCR 2.119(E)(2). MRE 901 required the document authenticated and that the original provided pursuant to MRE 1002.

(Ex A p5) The probate court relied on one statement from the 2010 pleadings that JES in 2010 was married to Maggie. Under MCL 700.2801(2)(e), willful absence or desertion should have been determined not whether the marital status had been maintained. The probate court simply found that because Maggie was married to JES she was a surviving spouse and the Court of Appeals agreed. (Ex C)

The Court of Appeals wrongly stated that the "continued emotional intimacy" was based on the 2010 lawsuit (Ex A p2) when the probate court's opinion states its conclusion was based on argument of counsel. (Ex C) There was no sworn testimony or documentary evidence admitted in the probate court that would support the Opinion. Moreover, the usages of prior pleadings are limited to the impeachment of a party. *Hanik v Wilczynski*, 33 Mich App 268 (1971); *Selph v Evanoff*, 28 Mich App 201 (1970); *Schwartz v Triff*, 2 Mich App 379 (1966). The Court of Appeals did not distinguish why the probate court was able to rely on prior pleadings before affirming the probate court's decision.

By not limiting use of prior pleadings, the Court of Appeals overturns *Grotelueschen v Grotelueschen*, 113 Mich.App 395, 398–399 (1982) that held that "[i]f either party in a marriage relationship is unwilling to live together, then the objects of matrimony have been destroyed."

Although King had requested an evidentiary hearing in probate court to determine the status of Maggie (07/09/14 Tr. 35 L 1-3), the Opinion concluded the probate court did not have to

---

For a document to constitute a "valid affidavit" it must be: "(1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Detroit Leasing Co. v City of Detroit*, 2006 WL 1009266, *Holmes v. Michigan Capital Medical Center*, 242 Mich App 703, 711 (2000), citing *People v. Sloan*, 450 Mich. 160, 177 n. 8, (1995). The Appellee supplemented the record after the Appellant had filed her brief with signed copies of the complaint and affidavit (notarized copy had a different notary). The lawsuit cited was dismissed with prejudice and only stated that Maggie was married to JES. The probate court never

hold such a hearing and could rely on MCR 2.119(E)(2). The only valid affidavits submitted to the probate court were by King and the probate court did not consider them. The Court of Appeals erred in determining that the probate court was correct in not holding an evidentiary hearing. But when the probate court did not make its ruling on affidavits, then the decision was not supportable by credible evidence.

C. ENTIRETIES PROPERTY

1. The Tkachik Decision.

The Michigan Supreme Court in considering *Tkachik, supra*, was faced for the first time the issue of whether a widower who was willingly absent from the marriage during the final 18 months of his wife's life be required to make a contribution to his deceased wife estate. Frank Mandeville, widower, held properties with the decedent, Janet, as tenants by entirety. Frank spent long periods away from Janet and was absent during the last 18 months of the Janet's life. She maintained the properties by paying all necessary expenses, including mortgage, tax, and insurance payments. Frank attempted to secure sole possession of the entirety properties and the personal representative of Janet's estate, Tkachik, requested contribution from Frank on the properties for expenses paid during his absence. The lower courts rejected Tkachik's request for contribution and she ultimately filed an appeal that the Michigan Supreme Court accepted. The Supreme Court found that Frank by operation of law as a tenant by entirety became the sole owner of the properties. However, the Supreme Court ruled that Janet solely maintained the properties during the period of Frank's' absence. In determining whether contribution on entirety property is appropriate, the Supreme Court determined that a court using it equity authority has

addressed the limited purpose of the lawsuit and even after its finding, Maggie still did not have a husband and wife relationship with JES.

the ability to make equitable decisions on marital property. *See Horner v McNamara*, 249 Mich App 177, 186 (2002).

The Supreme Court then found that Frank was unjustly enriched due his absence from Janet during the last18 months of her life. The Supreme Court then held that it would be equitable for Frank to contribute for expenses incurred in maintaining the properties during his absence.

2. <u>The Tkachik Decision Applied to Instant Matter.</u>

Tkachik was the" blueprint" for this matter. Frank and Janet held properties as tenants by the entirety. JES and Maggie held the Douglass property as tenants by the entirety. Frank was absent from Janet for 18 months while Maggie was absence from JES for over 36 years. During Frank's absence, Janet paid all the maintenance expenses of the entirety properties. During Maggie's absence, JES paid all the maintenance expenses of the entirety property. At Janet's death, Frank sought and claimed sole ownership of the entirety properties. At JES' death, Maggie now claims sole ownership of the entirety property.

In *Tkachik*, the Supreme Court defined "unjust enrichment as the unjust retention of money or benefits which in justice and equity belong to another. *Id* at 47-48. The Supreme Court found that due to Frank's absence of 18 months, he would be unjustly enriched if he received the entireties properties after his absence and equity requires that he should contribute to the estate for the maintenance of the entirety properties.

King argued in probate court that due to Maggie's extended absence of over 36 years, she would be unjustly enriched and equity requires that she should contribute to the Estate for the maintenance of the Douglass property. The probate court's opinion stated," Personal Representative relies on the case of Tkachik v Mandeville, 287 [sic] Mich 38 (2010" and then

stated "in the Tkachik case, the surviving spouse had willfully abandoned the other spouse." The opinion then stated:

> "In the case at hand, Maggie Erwin and James Erwin Sr. chose a separated lifestyle. The **arguments presented** indicated that Maggie Erwin and James Erwin Sr. still had contact and an on-going relationship during their separated years, with Maggie Erwin even providing care for James Erwin Sr. at some point in time. There was no willful abandonment within the Erwin matter, by either party. Thus, the court determines that Maggie Erwin shall not be required to make contributions to the estate as it relates to the Douglass Street property (emphasis added)"

The probate court found the *Tkachik* case distinguishable because there was no willful abandonment. However, as the probate court found, JES and Maggie were separated and maintained separate households for over thirty years before his death. The probate court had no evidence to rely on but the argument put forward by Maggie's counsel and Nash's unsworn statements that Maggie had actually cared for JES or maintained "continued emotional intimacy."

An attorney's statements and arguments are not evidence. *Cliff v Michael E. Heath, D.D.S.*, 2011 WL 14475, *People v Mayhew*, 236 App 112,123, n5 (1999) Furthermore, MRE 603 requires that any person who testifies in court be administered an oath to testify truthfully. The argument of no abandonment is just that, argument and not evidence. The probate court ignored sworn statements in the form of affidavits that is admissible evidence there was abandonment and instead relied on non-admissible evidence in the form of argument.

The Court of Appeals when considering *Tkachik* found there was evidence that JES provided Maggie with financial support. (Ex A p6) The Opinion is wrong. No evidence was ever submitted or testimony given that JES was providing financial support to Maggie. Moreover, King never received, even though requested, evidence that Maggie remained the beneficiary on JES employment life insurance policy.

The Court of Appeals has expanded the holding of *Tkachik* to require some proof that decedent had planned to disinherit the absence spouse. Since this issue was never addressed in the probate court, the Court of Appeals created a factor to support its decision. The Court of Appeals never addressed the central holding from *Tkachik* issue, whether the absence spouse is unjustly enriched if she/he does not have to make a contribution on transfer of the entireties property. This Application seeks to have the errors of the Court of appeals corrected.

D. REMOVAL OF PERSONAL REPRESENTATIVE

1. Standing as Interested Person.

King was appointed personal representative in June of 2013, after a filing a petition for an informal and unsupervised estate pursuant to MCL 700.3301 through 700.3311. The Court of Appeals found that Maggie is as a spouse under MCL 700.1105 so she filed a petition to remove King as personal representative pursuant to MCL 700.3611(1).

MCL.700.1105(c) defines a spouse as an interested person. However, MCL 700.1102 defines the applicability of definitions under MCL 700.1105. Specifically, the provision provides:

> "[T]he definitions contained in this part apply throughout this act **unless the context requires otherwise or unless a term defined elsewhere in this act is applicable to a specific article, part, or section (emphasis added)**."

In the instant matter, MCL 700.1105(c) is not applicable because there is a more specific definition of a spouse when a decedent spouse dies intestate. MCL 700.2801(2) specifically excludes from the definition of a spouse, a spouse that deserted the decedent or was willfully absent from the marriage for one year before the decedent's death.

Whether the statute excludes Maggie from the definition of a surviving spouse is the issue before the Court and the Court of Appeals reliance on MCL 700.1105(c) is misplaced. MCL

600.867(1) provides for a stay from final orders from probate court. Neither the probate court nor the Court of Appeals would give proper deference to statute. Maggie should have not been allowed to file a petition to remove King when she had no standing to do so even though the probate court determined that Maggie was the surviving spouse and thus, was an interested person who can seek removal of King as personal representative. (05/06/15 Tr. 26) Moreover, neither the probate court nor the Court of Appeals questioned the petition when Maggie did not have the mental capacity to file such a petition and clearly it was initiated by Oakes who holds an alleged power of attorney. There would appear to be conflict when Oakes owes $5,000 to the Estate but yet seeks the closure of the Estate.

2. Conditions for Removal

The Court of Appeals reviews a removal of a personal representative for an abuse of discretion. *In re Temple Martial Trust,* 278 Mich App 122, 128 (2008). An abuse of discretion occurs when the probate court chooses an outcome outside the range of reasonable and principled outcomes. *Id* at 128. However, if the lower court's ruling involves the interpretation and application of court rules and statutes, the Court reviews the ruling de novo. *Huntington Nat Bank v. Ristich,* 292 Mich.App 376, 383 (2011).

MCL 700.3611(1) provides "[A]n **interested person** may petition for removal of a personal representative for cause at any time (emphasis added)." MCR 5.125 defines interested persons. The probate court determined that Maggie was the surviving spouse of JES and thus, was an interested person who could seek removal of King as personal representative. (05/06/15 Tr. 25-26, 07/06/15 Tr. 26) The probate court further determined that the stay of MCL 600.867 only applied to Maggie when it came to distributions from the Estate. (05/06/15 Tr. 26-28) The

Court of Appeals also would not grant a stay which allowed Maggie to pursue the removal of King.

The probate court reversed its position in the hearing held on July 6, 2015 and ruled that Maggie should be stayed as the surviving spouse of JES. (07/06/15 Tr. 25) However, during the May 18, 2015 hearing, the probate court without any support determined that Maggie paid a funeral expense and she was an interested person because of the claim. (05/18/15 Tr. 21)

The Court of Appeals determined Maggie was an interested person because she was a spouse as defined under MCL 700.1105(c). The Court of Appeals found it was irrelevant whether Maggie could inherit as a surviving spouse under the Michigan intestacy laws. (Ex A p7, n3) This ruling establishes a scenario where a person who has no right to inherit from an estate but can control how the estate is administrated. The jurisprudence of the State should not allow a person who has no interest in the estate to control how the estate is administrated. The Opinion opens the door for such a situation.

To remove a personal representative, MCL 700.3611(2) provides:

> [T]he court may remove a personal representative under any of the following circumstances:
> (a) Removal is in the best interests of the estate.
> (b) It is shown that the personal representative or the person who sought the personal representative's appointment intentionally misrepresented material facts in a proceeding leading to the appointment.
> (c) The personal representative did any of the following:
> (i) Disregarded a court order.
> (ii) Became incapable of discharging the duties of office.
> (iii) Mismanaged the estate.
> (iv) Failed to perform a duty pertaining to the office.

The probate court has never conducted an evidentiary hearing to gather evidence to support allegations made against King. Moreover, MCR 2.119(E)(2) was not applicable because the probate court did not base its rulings on affidavits. From the probate court ruling, it never considered King's Response. (Ex D)

The Court of Appeals did not consider the unusual circumstances on how King was removed even though it was detailed in a motion for a stay and in King's Appellant's Brief. King was never given the opportunity to defend the allegations made against her. The Court of Appeals did not find it was necessary to at least give King her "day in court."

3. Basis of King's Removal.

King has never disregarded a court order or mismanaged the Estate. Absence evidence of such wrongdoing, King's removal was improper. *See In re Duane v. Baldwin Trust* 274 Mich App 387, (2007) Moreover, there is no evidence that King has harassed or mistreated Maggie or her children (Nash, BJE, and Oakes).

The record from the probate court will clearly show that neither King nor her counsel has had direct or indirect contact with Maggie and/or the complaining heirs. King has filed two motions to compel production and the probate court granted both motions. However, the probate court has steadfastly refused to order Maggie or Nash, BJE and Oakes to turnover assets to King or order sanctions when requested.

For example, King had requested accounting of bank accounts because Nash had moved bank accounts of JES to Kansas and the probate court took no action when requested. In another example, King provided an email that demonstrated Nash attempted to get the proceeds from a lawsuit settlement paid directly to Maggie. When her attempt failed, she supplied an email she had in her possession since January but did not provide it to King until several months later in March. *See* Appellant Brief Docket # 329264 Ex Z When presented to the probate court as evidence that Nash was concealing assets, the court took no action.

Outside of the harassment argument, Maggie sought King's removal because of the failure to file an inventory and accounting. The probate court was aware that King only had access to

nominal assets unless the Maggie's children cooperated and disclosed assets. Instead of ordering compliance, the probate court allowed Maggie, Nash, and Oakes to file petitions seeking to remove King as personal representative. Is it not suspicious that those same individuals, a minority of the Estate's interested persons, who King attempted to question about concealed assets are the same individuals who sought King's removal and to close the Estate.

King had filed an interim inventory with the intent to amend it when King recovered sufficient assets to determine to true value of the Estate. The probate court used the alleged non-filing of inventory, no accounting, and no schedule of costs incurred (05/18/15 Tr. 9, 14) as a basis for her removal. However, since the JES Estate is an informal unsupervised estate, the personal representative is not required to file an accounting with the probate court.

Although King filed zero Inventory Form to be in compliance with MCL 700.3706(2); MCR 5.307(A), if the probate court determined King was not properly administering the Estate, MCR 5.203 provided the Follow-Up Procedures which did not require removal. Moreover, MCR 5.203 would only be applicable if King failed to comply with MCL 700.3951(1), Filing of Notice of Continued Administration. King timely filed the Notice of Continued Administration on June 9, 2014 and June 12, 2015. *See* Appellant Brief Docket # 329264 Ex O There is no allegation that King has misappropriated funds because King and her counsel have paid all the expenses of the Estate out of pocket. However, the probate court removed King because she failed to file an accounting disclosing how much of her money she spent on the Estate because it was in the best interest of the Estate. Again, the only interested persons complaining of an inventory, accounting and seeking to close the Estate are those same individuals who King has attempted to question about concealed assets, Maggie's children.

The removal of King as personal representative can only be for cause. *In re Kramek Estate*, 268 Mich App 565,710 NW2d 753 (2005). The procedure prescribed in the court rules for removal of a personal representative of an estate applies only to situations where the personal representative has done or has failed to do something that is not capable of correction. *Matter of Estate of Sumpter*, 166 Mich. App. 48, 419 N.W.2d 765 (1988) When the cause for removal cannot be corrected, then the procedures for the removal of the personal representative are applicable. Moreover, *In re Kramek Estate, supra*, the Court found that it was not in the best interest of the estate that the personal representative be removed because of bickering among heirs and the potential conflict of interests over a settlement agreement and concern for litigation costs.

The allegations that King failed to file an inventory and provide an accounting even through King has not collected all Estate assets and Continuation Forms had been filed should not have been a basis for her removal. The filing of an inventory and accounting is all that was need to correct an alleged cause. *Matter of Estate of Sumpter, supra.* Moreover, if Maggie or any other interested person was that concerned with an inventory and accounting when certain interested persons have not disclosed most assets, those interested persons could have made a request pursuant to MCL 700.3415. In an unsupervised estate, the request under MCL 700.3415 would not have been as drastic as a removal and the practical resolution. Moreover, in an informal unsupervised estate, as mentioned above, there is no requirement that King must file an accounting with the probate court. *See* John H. Martin, *Improving Michigan Estate Settlement*, 29 T.M. Cooley L. Rev. 1, 21-22 (2012)

The probate court not only removed King but awarded sanctions against King and LFE for actual attorney fees to both Miller and Bernstein for " the repeated filing of pleadings that do not comport to either the court rules, the statutes or law in the State of Michigan." (05/18/15 Tr. 20)

The probate court never identified the pleading that justified the award of actual attorney fees. It is ironic that the court on one hand removed King as personal representative for not filing enough pleadings but sanctioned King and LFE for on unidentified non-comporting pleading. In addition, the probate court also ruled that either King or LFE can collect any fees even though they had financed the administration of the Estate (05/18/15 Tr. 21-22)

MCL 700.3705(1) provides "[a] personal representative is under a duty to settle and distribute the decedent's estate ...as expeditiously and efficiently as is consistent with the best interests of the estate." The best interest of the estate is the best interest of all the heirs and not 1 or 2 or a minority. The best interest is to try to undercover all the significant assets not the nominal ones that are "the low hanging fruit" as offered by Appellee.

The Court of Appeals affirmed the probate court decision to remove King as personal representative because of the failure to provide an accounting to Oakes. This is the same Oakes who failed to disclose the power of attorney held for Maggie and is the force behind the petition to remove King as personal representative. This is the same Oakes that the judges in Saginaw Probate Court who supposedly disqualified themselves[9] because of their personal relation with her. This is the same Oakes who owes $5,000 to the Estate but has sought to close the Estate.

[9] King has provided documentation in her Appellant Brief Docket 329264 Ex K that Oakes attorney, Miller, had ex parte communication with the residing probate court judge in Tuscola County and with the supposedly disqualified Saginaw County Probate Court judge. During oral before the Court of Appeals that the Saginaw County was coordinating the hearing in Tuscola County that included the Saginaw County Register having constant communication win the supposedly disqualified judge regarding the case and the proceedings.

The Court of Appeals states that the record was "replete with familial conflict[10]." The only conflict, however, is the resistance of heirs who refuse to disclose or release possible estate assets.

The Opinion in supporting the removal of King is grounded on the fact that Oakes did not receive an accounting. Pursuant to MCL 700.3703(4) an annual accounting is based on receipt and disbursements from "the estate." King has not spent estate funds and has only collected minimal funds. King admits that an accounting is required to be provided interested persons, but due to the nominal amounts found and the only demand coming from Oakes, King perceived Oakes' request as an irritant. The majority of the heirs had approved oral progress reports.

E. VENUE AND DISQUALIFICATION

The Court of Appeals stated King's appeal on the issues of venue and disqualification was not properly before it because they did not result from a final probate court order. The appeal was considered as an application for leave to appeal which was granted.

The probate court, however, stated the order on venue and disqualification was final. (05/06/15 Tr. 28). MCL 600.861 is a statutory authority that allows a party to a probate proceedings to file an appeal directly with the Court of Appeals when a" **final order** affecting the rights or interests of any interested person in an estate or trust."

1. Venue

[10] The Court of Appeals referenced to emails from Oakes attorney Miller was a request for an accounting but the Court of Appeals failed to disclose that Miller refused to either have Oakes pay the money owed the Estate provides proof that she repaid the loans. King provided affidavits that loan document had disappeared from the home safe and there was no proof of payment.

The court rule for change of venue is MCR 5.128(A) and lists the reasons for change. It provides:

> "On petition by **an interested person** or on the court's own initiative, **the venue of a proceeding may be changed to another county by court order for the convenience of the parties and witnesses, for convenience of the attorneys, or if an impartial trial cannot be had in the county where the action is pending** (emphasis added)**."**

MCR 5.128 is the probate version of MCR 2.222 except considerably relaxed. An interested party only has to demonstrate the inconvenience of the present venue.

MCL 700.3201 provides:

> "(1) Venue for the first informal or formal testacy or appointment proceeding after a decedent's death is 1 of the following:
>
> (a) ***The county where the decedent was domiciled at the time of death.***
>
> (b) ***If the decedent was not domiciled in this state, in a county where property of the decedent was located at the time of death.***
>
> (2) Venue for a subsequent proceeding that is within the court's exclusive jurisdiction is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in subsection (3), in section 856 of the revised judicature act of 1961, MCL 600.856, or by supreme court rule.
>
> (3) If the first proceeding described in subsection (1) was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.
>
> (4) On motion by a party or on the court's own initiative, a proceeding's venue may be changed to another county by court order for the convenience of the parties and witnesses, for the attorneys' convenience, or if an impartial trial cannot be had in the county where the action is pending. (emphasis added)"

Under MCL 700.3201, "domicile" is where his or her "home" was at the time of death. *Kleinert* v. *Lefkowitz,* 271 Mich. 79, 259 N.W. 871 (1935). If the decedent is not domiciled in the state, then venue is proper in the county where decedent had property at the time of his death.

JES domicile at the time was Kansas since he was not able to return to Saginaw. He did not own property at the time of his death because the only property in his name passed by operation of law to Maggie. Because Maggie had been separated from JES for over 35 years at the time of his death, the issue of whether she should make a contribution to the Estate for the

property's maintenance for the time she was voluntarily absent was an issue appealed.

The probate court erred in not allowing a change of venue for the convenience of the majority of the interested persons not just LFE. Under MCL 700.3201, JES Estate is not required to be in Saginaw County although it is being heard in Tuscola County. Pursuant to MCL 700.3201(2), a change of venue can be made for the convenience of the interested persons.

The probate court denied King's Petition and Order to Change Venue not because it was for the convenience of the majority of interested persons but because the probate court determined it would only benefit LFE. The probate court applied the wrong standard and never determined whether it would be convenient for all the other interested persons.

The Court of Appeals ruled that venue should not be changed because of the time the petition was filed. However, MCR 5.128 does not have a time perimeter is more liberal version of MCR 2.222. Moreover, the probate court denied the change because King agreed to have the case heard in Tuscola County. What both the probate court and Court of Appeals overlooked is the other interested persons wanted the venue changed and they did not sign the stipulation[11].

2. <u>Disqualification of Judge</u>

MCR 2.003 outlines the procedure and grounds for disqualification of a Michigan judge. MCR 2.003(C) requires disqualification in order to protect a litigant's right to an impartial decision maker. The rule provides a non-exhaustive list of various grounds for disqualification, "including but not limited to instances in which: (1) [t]he judge is personally biased or prejudiced for or against a party or attorney."

[11] A change of venue was sought because it was apparent that Saginaw County was controlling the proceedings in Tuscola County. Maggie had obtained a restraining order on May 5, 2016 and in that order before the hearing on May 6 2015, denied the change of venue Appellant Brief Docket # 329264 Ex Y.

Under the circumstances, even a judge's own subjective belief that he or she may harbor no actual bias that would preclude the court from presiding fairly and impartially in the matter is insufficient to justify the judge's continued participation, particularly when viewed in light of the judge's further obligation, under the *Michigan Code of Judicial Conduct, Canon 2(A),* which states, in pertinent part, that:

> "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety."

As recognized by the United States Supreme Court in the case of *In Re Murchison*, 349 U.S. 133 (1955), a judge whose impartiality is questioned by a litigant may well be the last person to perceive actual bias against that litigant. As such, *a finding of actual bias is not necessary* in order to require disqualification *when the circumstances disclosed by the record would give rise to serious doubts,* in the minds of objective and disinterested observers, about the judge's ability to remain wholly impartial. As noted by the Court in *Murchison:*

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. However, our system of law has always endeavored to prevent even the possibility of unfairness. To this end, no man can be a judge in his own cage and no man is permitted to try cases in which he has an interest in the outcome that interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man a judge ... not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally high between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Murchison*, supra, at 136. [Citations omitted]."

Thus, even where actual bias or prejudice is not affirmatively shown or established with certainty, the Michigan Supreme Court has stated, "[W]e acknowledge there may be situations in *which the appearance of impropriety on the part of a judge*... is so strong as to rise to the level of a due process violation." *Cain v. Dep't of Corrections*, 451 Mich 470, 513. Further, the

constitutional right to due process requires disqualification where "experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Cain*, supra, at p. 498, quoting *Crampton v. Dep't of State*, 395 Mich 347 (1975). See also, *Withrow v Larkin*, 421 U.S. 35, 47 (1975).

Intent, scienter, or prior knowledge of the facts giving rise to the appearance of impropriety is not necessary in order to warrant a judge's disqualification. Thus, in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 100 L. Ed. 2d 855 (1988), the court noted:

"... advancement of the purpose of the provision -- to promote public confidence in the integrity of the judicial process --does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg*, supra, at 859-60.

The first hearing in the probate court was held on January 22, 2014. The probate court allowed then Oakes's attorney to change the hearing date on King's Motion to Compel without notice to King and/or LFE. The scheduled hearing was based on the falsification of LFE's signature.

Since that hearing, the probate court has consistently ruled in favor of the Maggie's children without an evidentiary hearing or the submission of any substantive evidence. The probate court has allowed Maggie to start a civil action on a funeral claim, which Maggie initially paid with cash but later changed to checks that did not correspondence to the claim amount. In addition, the probate court has allowed Maggie's attorney, Bernstein, to unitary change a hearing date for a motion filed by King and recently, signed on May 5, an ex parte restraining order one day before King and LFE appeared before the Court on May 6, 2015. Moreover, the restraining order established a hearing date that King and LFE only learned of just before the hearing from

another pleading. Neither the probate court nor Bernstein notified King and LFE that a restraining order was outstanding against them and why.

During the May 6, 2015, LFE advised the Court he had a conflict with the hearing date set by Bernstein for May 18, 2015. LFE provided counsel proof of his conflict to opposing counsels. Nonetheless, Bernstein appeared for the hearing before the probate court. LFE received neither notification from Bernstein nor the probate court regarding the hearing. The probate court entered an order in flavor of Bernstein unopposed removing King as personal representative and for sanctions awarding actual attorney fees[12].

Contrast the treatment received by Bernstein. *See* Appellant Brief Docket # 329264 Ex AA. On June 10, 2015, the probate court had scheduled a final pretrial conference for 10:30 am. LFE drove from Detroit, some 2/12 hours, to Caro Michigan to attend the conference.

Bernstein did not appear for the conference in person but did participate by telephone. When Bernstein did not appear in person, the probate court telephoned Bernstein to advise her of the hearing and allowed her participates by telephone. After the conference, the probate court told LFE he could also participate by telephone for the first time. The probate court had not made this option available to LFE as stated by the probate court in LFE's absence during the May 18, 2015 hearing (05/18/15 Tr. 23). During the July 6, 2015, LFE explained how he participated in a telephone conference and it was not because the court called him, he called the court. (07/06/15 Tr. 12-13). The probate court made the statement that LFE was allowed to appear as a courtesy but that was not factual correct. (07/06/15 Tr. 29)

The probate court did not attempt to reach LFE on May 18, 2015 to determine if he could participate but entered an order removing King as the estate personal representative as a default

for not appearing. Pursuant to MCR 2.401(G)(1), the failure of an attorney or party to appear at a pretrial conference constituted a default under MCR 2.603 or a ground for dismissal under MCR 2.504(B). If the probate court was dispensing equal treatment then the civil action complaint of Maggie should have been dismissed.

If the probate court was fair and balanced, it should have called LFE on May 18, 2015 to determine why he was not present at the hearing. It chose not to call and held the hearing, and allowed the entry a default order under the 7-day rule and then rejected the filing of the objections after the order was receipted under questionable circumstances.

The probate court has allowed attorneys in this matter to disregard the stay of MCR 2.614 and stay of MCL 600.867(1). For example, Miller filed a Motion for the Payment of Attorney Fees on July 21, 2015 before the final order awarding attorney fees as sanctions was entered on August 26, 2015. (08/13/15 Tr. 10-20) King filed for a rehearing in a timely fashion and the removal order that include the award of sanctions was not effective until August 26, 2015. King filed a Claim of Appeal on September 15, 2015 in which the award of attorney fees were challenged.

An order was entered on October 16, 2015 for the payment of attorney fees to Oakes and a motion for rehearing and stay was filed on or about November 6, 2015 with a hearing date set for December 9, 2015. . A stay should have been in effect but the probate court allowed Writs of Garnishments to be filed not on a judgment but on an order that should have been stayed. *See* Appellant Brief Docket # 329264 Ex EE Moreover, Miller falsely stated that a judgment was obtained on September 4, 2015 when a judgment had not been entered in the matter at all and

[12] After having two motions to compel granted and discovery orders presented and not honored, King filed a motion for sanctions. The probate court would not grant.

Miller had a pending motion before the Court of Appeals to dismiss part of King's appeal in regards to attorney fees.

Even though the case law establishes that unfavorable rulings alone is not enough to disqualify a judge, considering the rulings made in this matter without evidential support and blatant bias cries for a change. King and the majority of the interest persons have no chance of getting a fair hearing without a change. To date, the, probate court has never sanctioned or ordered heirs to turnover asset.

The Court of Appeals affirmed the probate court but found bias was not demonstrated because the probate court only called Bernstein once and when Oakes attorney, Miller, did not appear at a hearing and he also did not get a call from the probate call. A closer analysis will disclose the probate court's bias against King.

Mr. Miller did not appear at the hearing on May 6, 2015 on King's Petition for Change of Venue. The probate court did not call Miller but at the hearing that King and LFE were not present, the probate court noted that Bernstein covered for Miller[13]. (05/18/15 Tr. 17) What was the consequence of Miller's failure to appear, the probate court awarded him actual attorney fees.

Ms. Bernstein did not appear at a pretrial conference on June 10, 2015. The probate court called her so nothing happen to her client's claim and she was able to participate in the conference with no penalty.

King and LFE were to appear at a hearing removing King as personal representative on May 18, 2015. Both King and LFE did not appear at the May 18, 2015 hearing because they believed the matter was being rescheduled. Neither King nor LFE received a telephone call or

[13] Miller supposedly represents Oakes individually and Bernstein supposedly represents Maggie. However, Oakes holds a power of attorney for Maggie so Bernstein works directly with Oakes because Maggie lacks the mental capacity to act on her own.

had anyone to cover for them. The consequences are that King was removed as personal representative and King and LFE have sanctions award against them for actual attorney fees for Bernstein and Miller. In addition, the probate court order does not allow them to receive any fees for the work performed and no reimbursement for expenses incurred.

Even though the Court of Appeals believes all the parties and attorneys were treated without bias. As noted earlier, Miller had ex parte communication with the probate court and with the disqualified judge. King's counsel, LFE, personal knowledge that Tuscola County Register had constant communication with the Saginaw County Register. After those communications, the Saginaw County Register would then hold meetings and discussions with the disqualified judge. The obvious conclusion is that Saginaw County is directing the proceedings in Tuscola County.

The normally the issuance of a restraining order is an extraordinary process. However, in an estate that allegedly has little to no assets, the probate court issued a restraining order because King, with her funds, filed a petition to change venue and a motion to stay the proceedings with the Court of Appeals. These filings were not frivolous filings and definitely not the type of actions justifying the issuance of a restraining order.

If all the factors are considered, the probate court has been bias. Moreover, the oversight by the disqualified judge hints that the proceedings are balanced toward Oakes. If our jurisprudence is to have the appearance of impartiality, a change of venue and disqualification of the probate judge is warranted.

CONCLUSION

For all the foregoing reasons, Appellant King most respectfully requests that this Court grant this Application for Leave to Appeal and grant peremptory relief that: (1) reverses the

decisions of the Court of Appeals and Saginaw County/Tuscola County Probate Court; (2) in the alternative, reverses the decisions of the Court of Appeals and the Saginaw County/Tuscola County Probate Court and order appropriate evidentiary hearings.

Respectfully submitted,

COMMERCIAL LAW CORPORATION, P.C.

By: _/s/ L Fallasha Erwin_____
L. Fallasha Erwin (P27018)
Attorney for Beatrice King,
220 Bagley, Suite 1010
Detroit, MI 48226
ferwin@sbcglobal.net
(313) 964-2502 (phone)
(313) 964-2929 (fax)

Date: June 21, 2016